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Supreme Court, U.S.
FILED

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In the

# Supreme Court of the United States

MICHAEL L. SCHWARTZ,

*Petitioner,*

*v.*

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY INC.,

*Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## SUPPLEMENTAL APPENDIX

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DATED DECEMBER 20TH, 2002 .....1a

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CIVIL ACTION
NO. 01-646
SECTION "K" (2)

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

MICHAEL L. SHWARTZ

VERSUS

AMERICAN EXPRESS TRAVEL RELATED SERVICES CO., INC.

FINDINGS AND RECOMMENDATION

Judgment has been entered in this case in favor of defendant, American Express Travel Related Services Co., Inc. ("American Express"), and against plaintiff, Michael L. Shwartz, (1) dismissing plaintiffs claims against defendant with prejudice and (2) awarding defendant $68,879.53, "plus costs and attorneys fees," on its counterclaims. Record Doc. No. 44 (emphasis added). In the judgment and the order upon which it was based, Record Doc. No. 28, the presiding district judge referred to me for report and recommendation the matter of the amount of attorney's fees to be awarded to defendant.[1]

As ordered, Record Doc. No. 30, American Express filed a motion for attorney's fees, supported by the declaration and billing statement of its attorney. Record Doc. No. 32. Shwartz filed a timely opposition

memorandum. Record Doc. No. 39. American Express received leave to file a reply memorandum. Record Doc. Nos. 40, 41. Following referral of the amount of attorney's fees to me, the parties entered into a joint stipulation that the amount of the judgment attributable to the Optima Card Account is $6,144.90 and the amount attributable to the Platinum Card Account is $62,734.63. Record Doc. No. 45.

Having considered the written submissions of the parties, the judgment, the record and the applicable law, and for the following reasons, IT IS RECOMMENDED that defendant be awarded $30,535.00 in reasonable attorney's fees.

## I. PROCEDURAL AND FACTUAL BACKGROUND

Shwartz was a credit cardholder with American Express of both an Optima Card and a Platinum Card. Both credit accounts were governed by written agreements. He sued after American Express cancelled both his cards and demanded payment of his outstanding balances.

Shwartz brought this suit against American Express in Louisiana state court, alleging breach of contract and intentional infliction of emotional distress. Petition, attached to Record Doc. No. 1. Defendant removed the action to this court pursuant to the court's diversity jurisdiction. Notice of Removal, Record Doc. No. 1. Eleven months after the removal, American Express filed a counterclaim for breach of contract and attorney's fees and costs, pursuant to the court's supplemental jurisdiction. Counterclaim, Record Doc.

No. 7. Because the action in this court is based solely on diversity jurisdiction, state substantive law applies.

This court entered judgment in favor of American Express on its counterclaims for a total of $68,879.53 under two different credit card agreements, known in this litigation as the Optima Card Account and the Platinum Card Account.

As to defendant's right to collect attorney's fees from plaintiff, the Optima Card Agreement provides in relevant part:

Upon your default and subject to any limitation or requirements of applicable law, you agree to pay all our reasonable costs, including reasonable attorneys' fees incurred by us (1) in collecting the balance due, including Finance Charges, if any, whether or not suit is brought against you, and (2) in protecting ourselves from any harm that we may suffer as a result of your default.

Defendant's Motion for Summary Judgment, Record Doc. No. 18, Exh. C (emphasis added).

The Platinum Card Agreement provides: "You agree to pay all court costs plus attorney's fees of 15% of the then unpaid balance if we must refer your account to an attorney who is not our employee, subject to the law of your jurisdiction." Defendant's Motion for Summary Judgment, Record Doc. No. 18, Exh. A (emphasis added).

## II. ANALYSIS

### A. The Applicable Law

In their respective memoranda, American Express argues that federal law applies to determine the amount of attorney's fees owed, while plaintiff argues that Louisiana law applies. In its opposition memorandum, American Express concedes that Louisiana law may apply but asserts that the same result would obtain under Louisiana law as under federal law.

Neither party addresses the clear language of the two contracts at issue, both of which plainly state that they are governed by Delaware law. Defendant's Motion for Summary Judgment, Record Doc. No. 18, Exhibits A, C; Defendant's Reply Memorandum in Support of Motion for summary judgment, Record Doc. No. 27, at p.1 n. l (acknowledging that both contracts state they are governed by Delaware law). Nonetheless, it appears to the court that Delaware law concerning awards of attorney's fees is substantially similar to Louisiana law.

Under Delaware law, "[i]n an action at law, a court may not order the payment of attorney's fees as part of costs to be paid by the losing party unless the payment of such fees is authorized by some provision of statute or contract. " Casson v. Nationwide Ins. Co.,, 455 A.2d 361, 370 (Del. Super. Ct. 1982) (citing Honaker v. Farmers Mut. Ins. Co., 313 A.2d 900 (Del. Super. Ct. 1973); J.J. White, Inc. v. Metropolitan Merch. Mart, 107 A.2d 892 (Del. 1954); Great Am. Indem. Co. v. State, 88 A.2d 426

(Del. Ch. 1952); Maurer v. International Re-Ins. Corp., 95 A.2d 827 (Del. Ch. 1953)).

In PVI, Inc. v. Ratiopharm GmbH, 253 F.3d 320 (8th Cir. 2001), the Eighth Circuit explained current Delaware law governing attorney's fee awards in contract cases.

> Despite [defendant's] contention that it is entitled to everything it owes or paid its attorneys because the contract allows for the recovery of "all . . . attorneys' fees," Delaware law limits fee awards, including awards made under contractual provisions similar in all relevant respects to this one, to those fees that are reasonably incurred in the prosecution of the action. The reasonableness of attorneys' fees is to be evaluated under the factors listed in canon 2, DR. 2-106(B), of the Delaware canons of professional responsibility. . . . Rule 1.5 of the Delaware rules of professional conduct [is] currently in effect and supersed[es] the canons of professional responsibility. . . .
>
> When attorneys' fees are awarded pursuant to a contract, moreover, the award of fees is limited to those specifically provided for in the contract.

Id. at 329-30 (citing Princess Hotels. Int'l, Inc. v. Delaware State Bar Assn. No. 95C-01-062,1998 WI, 283465, at *7 (Del. Super. Ct. Mar. 10,1998); Rock v. Short, 336 A.2d 219, 221 (Del. 1975); General Motors Corp. v. Cox, 304 A.2d 55, 57 (Del. 1973); Council of Wilmington Condo. v. Wilmington Ave. Assocs., L.P., No. Civ. A. 94C-09-004,1999 WL 1223792, at *2-3 (Del. Super. Nov. 3, 1999)).

Under the Delaware Professional Conduct Rule 1.5(a) the factors to be considered in determining the "reasonableness" of a fee include the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyers performing the service; and (8) whether the fee is fixed or contingent.

Manubay v. Stanton Med. Bldg. Condo. Council. No. Civ. A. 1999-03-302, 2000 WL 33275029 (Del. Com. Pl. Jan. 5, 2000).

Similarly, under Louisiana law, "attorney fees are not allowed except where authorized by statute or contract." State Dept of Transp. & Dev. v. William 597 So. 2d 439, 441 (La. 1992) (citation omitted); accord Short v. Plantation Mgmt. Corp., 781 So. 2d 46, 65 (La. App. 1st Cir. 2000). "Louisiana Civil Code Article 2000[2] provides that if the parties have, by contract, expressly agreed that the obligor shall be liable for the obligee's attorney fees in an amount that is fixed or determinable, the obligee is entitled to collect that amount of attorney fees as stipulated in the written contract." Teche Bank & Trust Co. v. Willis, 631 So. 2d 644, 646-47 (La. App. 3d Cir. 1994).

Although "attorney fees are stipulated in a contract, and notwithstanding [La. Civ. Code] art. 2000, the courts may inquire into the reasonableness of the fee." Scott v. Noel, 506 So. 2d 1313, 1315 (La. App. 2d Cir. 1987) (citing Central Progressive Bank v. Bradley, 502 So. 2d 1017 (La. 1987); City of Baton Rouge v. Stauffer Chem. Co., 500 So. 2d 397 (La. 1987)); accord Teche Bank & Trust Co., 631 So. 2d at 646. "Courts may inquire as to the reasonableness of attorney fees as part of their prevailing, inherent authority to regulate the practice of law." Williamson, 597 So. 2d at 441-42 (citing City of Baton Rouge, 500 So. 2d at 397; Leenerts Farms, Inc. v. Rogers, 421 So. 2d 216 (La. 1982)). In all cases, an attorney's right to "a recovery is subject to the court's authority to review excessive or unearned fees." Francis v. Hotard, 798 So. 2d 982, 986 (La. App. 1st Cir. 2001).

Thus, this court must examine the reasonableness of the amount before making an attorney's fee award, even if the amount of fees is stipulated in the contract. Fourchon Docks. Inc. v. Milchem Inc., 849 F.2d 1561, 1567-68 (5th Cir. 1988); Bankers Trust Co. v. Tonka Props., Inc., No. 96-3455,1997 WL 436248, at *2 (E.D. La. Aug. 1, 1997) (Fallon, J.); Oak Tree Savs. Bank v. Richland Corp., No. 92-2039, 1993 WL 185664, at *4 (E.D. La. April 3, 1993) (Sear, C.J.); Central Progressive Bank, 502 So. 2d at 1017; Schwegmann Bank & Trust Co. v. Dunne, 693 So. 2d 349, 354 (La. App. 4th Cir. 1997).

A "reasonable attorney's fee is determined by the facts of an individual case. In making awards for attorney's fees, the trial court is vested with great discretion, the exercise of which will not be interfered with except in a

case of clear abuse." Richardson v. Parish of Jefferson, 727 So. 2d 705, 707 (La. App. 5th Cir. 1999) (citation omitted) (emphasis added).

"The fundamental measure of attorney's fees is reasonableness, considering the factors set forth by Rules of Professional Conduct R.1.5." Mayeur v. Campbell, 666 So. 2d 366, 370 (La. App. 1st Cir. 1995). This court has adopted the Louisiana Rules of Professional Conduct to govern the conduct of attorneys appearing before it. Local Rule 83.2.4E.

The factors, derived from Louisiana Rule of Professional Conduct 1.5(a),[3] to be taken into consideration in determining the reasonableness of attorney's fees include: (1) the ultimate result obtained, (2) the responsibility incurred, (3) the importance of the litigation, (4) the amount of money involved, (5) the extent and character of the work performed, (6) the legal knowledge, attainment and skill of the attorneys, (7) the number of appearances involved, (8) the intricacies of the facts involved, (9) the diligence and skill of counsel and (10) the court's own knowledge. Richardson, 727 So. 2d at 707 (citing Rivet v. State Dep't of Transp. & Dev., 680 So.2d 1154, 1161 (La. 1996)).

"An award of attorney fees must be reasonable, based upon the degree of skill and work involved in the case, the number of court appearances, the depositions, and the office work involved." Gaston v. Bobby Johnson Equip. Co.. 771 So. 2d 848, 855 (La. App. 2d Cir. 2000) (citing Frentress v. Howard, 728 So. 2d 1019, 1022 (La. App. 2d Cir. 1999)). In determining a fee award, the court should consider the entire record, including

discovery, pretrial motions, the legal issues involved and the length of trial. Richardson, 727 So. 2d at 707.

The court will apply the above principles derived from both Delaware and Louisiana law to determine a reasonable fee in this case.

B. Plaintiff s Arguments in Opposition to the Fee Application Are Largely Meritless

American Express requests reimbursement of all of its attorney's fees incurred in defending plaintiffs lawsuit and bringing its counterclaims to judgment, for a total requested fee of $30,535.04. Defendant's attorney, Robert L. Walsh, of the law firm of Jones, Walker, Waechter, Poitevent, Carrère & Denègre, L.L.P., has provided his declaration, Defendant's Exh. A, that the fees incurred are documented by an attached pro forma statement, which reflects contemporaneous time reports of services rendered. Defendant's Exh. B. Walsh avers that all services were billed at the customary hourly rates of each attorney and paralegal listed, and that these hourly rates are reasonable in this community for the type of work in this action. Defendant's Exh. A.

Shwartz first argues in opposition that American Express is not entitled to any attorney's fees because the presiding district judge did not specifically rule that American Express was so entitled in his order and reasons and original judgment. That argument has been laid to rest by the court's amended judgment entered on November 12, 2002, which specifically entered judgment in favor of American Express for its attorney's fees. Alternatively, plaintiff argues that

American Express must be limited to recovery of its reasonable attorney's fees pursuant to the two contracts. The Platinum Card Agreement permits defendant to recover 15% of the unpaid balance, while the Optima Card Agreement permits defendant to recover its reasonable attorney's fees.

Shwartz contends that American Express is not entitled to any fees for its efforts spent defending plaintiff s lawsuit, as opposed to amounts incurred in collecting the debts owed to American Express through its counterclaims. He asserts that he instituted this lawsuit, alleging a genuine contractual dispute, that it was not a suit for collection until American Express filed its counterclaims; that the contracts permit American Express to recover only its fees involved with collection and that American Express has not differentiated its time spent on these separate issues.

Plaintiff's argument is unpersuasive in several respects. First, in granting summary judgment to American Express on both plaintiff's claims and defendant's counterclaims, the presiding district judge ruled that the express language of the agreements defeated Shwartz's breach of contract claim. See Order and Reasons, Record Doc. No. 28, at pp. 6-7. Thus, even assuming that the presence of a "genuine dispute" over a contract could defeat a contractual entitlement to attorney's fees, the district judge has already determined that Shwartz presented no evidence to create a fact issue that such a genuine dispute existed.

Second, the cases cited by plaintiff are clearly distinguishable. In National Roofing & Siding Co. v. Giaise, 434 So. 2d 85, 87 (La. App. 5th Cir. 1982), the

court found partially in favor of the defendant homeowner, who was sued for payment of the complete purchase price, by deducting an offset from the purchase price. The court refused to interpret literally the contract terms regarding an award of attorney's fees "for collection." The court held that the plaintiff contractor was not entitled to contractual attorney's fees, even though plaintiff was awarded some of the damages it sought, because to do so would render the contract inequitable in light of the partial defects in the contractor's work that permitted the homeowner to refuse to pay the full purchase amount. In National Roofing & Siding Co. v. Gulf Coast Oil Co.. 422 So. 2d 204, 206 (La. App. 4th Cir. 1982), the same contractor sued for the balance of the contract price for a new roof, and the defendant shopping center counterclaimed for damages to its parking lot caused by the contractor. The court awarded defendant damages on its counterclaim and held that plaintiff could not collect its contractual attorney's fees even though it prevailed on its claim because the amount of the counterclaim award was commensurate with the amount owed on the contract. No similarly favorable circumstances exist for Shwartz, who lost on both his own claims and defendant's counterclaims.

Third, the contracts in this case do not limit recoverable attorney's fees only to those for simple collection of amounts owed by plaintiff, as plaintiff contends. The Optima Card Agreement provides:

Upon your default and subject to any limitation or requirements of applicable law, you agree to pay all our reasonable costs, including reasonable attorneys' fees incurred by us (1) in collecting the balance due,

including Finance Charges, if any, whether or not suit is brought against you, and (21 in protecting ourselves from any harm that we may suffer as a result of your default.

Defendant's Motion for Summary Judgment, Record Doc. No. 18, Exh. C (emphasis added). The Platinum Card Agreement provides: "You agree to pay all court costs plus attorney's fees of 15% of the then unpaid balance if we must refer your account to an attorney who is not our employee, subject to the law of your jurisdiction." Defendant's Motion for Summary Judgment, Record Doc. No. 18, Exh. A (emphasis added).

By their plain terms, neither of these provisions limits American Express to recovering attorney's fees solely on its counterclaims. Shwartz was in default when he filed his lawsuit and American Express was forced to protect itself from harm caused by his default by hiring outside attorneys to defend the suit and to file counterclaims. Therefore, American Express was not required to segregate its fees between defense of plaintiff s suit and collection of the amounts owed on its counterclaims.

C. Reasonable Attorney's Fees

Shwartz finally argues that, at most, American Express should recover 15% of the total judgment amount of $68,879.53, or $10,331.93, in attorney's fees because that is the amount specified in the Platinum Card Agreement and any higher amount is unreasonable, based on the amount of work involved in this action. As the law outlined above indicates, the court is not

restricted under the circumstances presented in this case to the percentage provided in one of the applicable contracts, but instead is obligated to set a reasonable fee.

According to Walsh's declaration, American Express seeks fees for each attorney and paralegal at his or her customary hourly rates, for a total of $30,535.00 in fees. Defendant's Exh. A. Walsh's declaration gives the court scant information about the qualifications and experience of the three attorneys who were enrolled as counsel of record and, apparently, the two paralegals and one law clerk who also worked on this case.

However, the court has researched the qualifications of the attorneys through the Martindale-Hubbell and Jones Walker law firm websites. These sites reveal that Walsh is a partner with 15 years of experience in commercial litigation, having been graduated magna cum laude from Loyola University Law School in 1986 and having clerked for a Louisiana Supreme Court justice for one year. The pro forma statement reveals that Walsh's hourly rate was initially $200, increasing to $210 in January 2002. Defendant's Exh. B. Coleman D. Ridley, Jr., was graduated cum laude from Tulane University Law School in 1998 and has practiced for three years in general litigation, following one year of clerking for a state appellate court judge. His billing rate was $145 per hour. Antonio D. Robinson was graduated cum laude from Southern University Law Center in 1998 and has practiced for four years, primarily in employment-related litigation, in the firm's Baton Rouge office. His billing rate was initially $140 per hour, increasing to $145 per hour in 2002.

Although Walsh states that paralegals worked on the case, he does not provide their names, qualifications or billing rates in his declaration. The pro forma statement uses only initials to refer to the person who performed the work. It appears to the court, based on their hourly rates in the pro forma statement, that two paralegals and a law clerk worked on this matter. It appears that paralegal ALA billed at $55 per hour and paralegal LSBR billed at $65 per hour. It appears that BRLC (which, based on time entries, the court assumes refers to a Baton Rouge Law Clerk) billed at $80 per hour.

"Hourly rates are to be computed according to the prevailing market rates in the relevant legal market. . ." Hopwood v. State, 236 F.3d 256, 281 n.107 (5th Cir. 2000)(quotation omitted). Shwartz does not contest the reasonableness of the hourly rates charged by counsel for American Express.

An attorney's requested hourly rate is prima facie reasonable when he requests that it be computed at his or her customary billing rate, the rate is within the range of prevailing market rates and the rate is not contested. Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319, 328 (5th Cir. 1995). Furthermore, my own experience in this court in reviewing and evaluating requests for awards of attorney's fees convinces me that the rates are within the range of attorney's customary billing rates in this legal community for attorneys with the skill, experience and qualifications of the three attorneys in this case and within the range of customary billing rates in this legal community for paralegals and law clerks. I find that the rates charged by each attorney, paralegal and law clerk for American Express are reasonable.

I next must consider whether the hours expended are reasonable. Shwartz asserts that many of counsel's time entries are too vague to be compensable.[4] To the contrary, I find that the entries are admirably well-documented.

Having considered the factors derived by the Louisiana and Delaware courts from their respective and identical Rules of Professional Conduct 1.5, I find that the hours billed are reasonable. These factors were analyzed as follows: (1) the time and labor required were not excessive, the questions involved were not novel or difficult, and the skill requisite to perform the legal service properly has already been taken into account in setting the attorneys' hourly rates; (2) acceptance of the employment did not preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services has already been taken into account; (4) the amount involved was not extraordinary and the results obtained were entirely successful on both defending against plaintiffs claims and asserting defendant's counterclaims; (5) there were no time limitations imposed by the client or by the circumstances; (6) American Express had an established professional relationship with the Jones Walker law firm; (7) the experience, reputation, and ability of the lawyers performing the service has already been taken into account in setting the hourly rates; and (8) the fee was fixed and is not a relevant factor.

Accordingly, I find that defendant's requested attorney's fees in the full amount of $30,535.00 are reasonable in this case.

## RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that American Express be awarded its reasonable attorney's fees in the full amount of $30,535.00, plus interest thereon from the date of judgment until paid pursuant to 28 U.S.C. § 1961.

A party's failure to file written objections to the proposed findings, conclusions and recommendations in a magistrate judge's report and recommendation within ten (10) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).

New Orleans, Louisiana, this 20th day of December, 2002.

JOSEPH C. WILKINSON, JR.
UNITED STATES MAGISTRATE JUDGE

FOOTNOTES

[1] American Express fled its application for costs and noticed it for hearing before the Clerk of Court. Record Doc. No. 35. It does not appear that the Clerk has ever ruled on the application. Although this action is on appeal, that appeal does not divest this court of jurisdiction to rule on applications for attorney's fees and costs.

[2] Louisiana Civil Code article 2000 provides:

When the object of the performance is a sum of money, damages for delay in performance are measured by the interest on that sum from the time it is due, at the rate agreed by the parties or, in the absence of agreement, at the rate of legal interest as fixed by Article 2924. The obligee may recover these damages without having to prove any loss, and whatever loss he may have suffered he can recover no more. If the parties, by written contract, have expressly agreed that the obligor shall also be liable for the obligee's attorney fees in a fixed or determinable amount, the obligee is entitled to that amount as well.

La. Civ. Code art. 2000 (emphasis added).

[3] The Louisiana Rule and the Delaware Rule are identical.

[4] Some of the entries have been partially redacted by defendant's counsel to protect attorney-client privileged communications. Shwartz does not contest this practice.